No. 77-665

IN THE

Supreme Court of the United States

October Term, 1977

UNITED STATES OF AMERICA,
Petitioner

v

STEPHEN PITCAIRN, AGENT FOR THE FORMER SHAREHOLDERS OF AUTOGIRO COMPANY OF AMERICA,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO

1. BELL HELICOPTER TEXTRON'S MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE, and
2. ELTRA CORPORATION'S MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

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Respondent objects to, and respectfully suggests that the Court deny, the subject Bell and Eltra motions because:

I. Respondent's consent to the filing of such briefs was withheld for good reason;

II. The motions and proffered briefs demonstrate that Bell and Eltra are unworthy candidates for the role of *amicus curiae;* and

III. The motions, even as augmented by the proffered briefs, do not present the showing required by Rule 42.

I. Respondent's Consent Was Reasonably Withheld

Respondent withheld its consent to the filing of *amicus curiae* briefs by Bell and Eltra for the following reasons:

First. The Court should not be burdened with extra briefs in support of a Petition which the Court is without jurisdiction to entertain since the Petition was not filed within the period allowed by law. [See Respondent's main brief, pp. 1-14, also see footnote 5, p. 7, *infra*]

Second. Bell and Eltra, as purported indemnitors, are Petitioner's friends, not the Court's. They cannot be expected to present anything which would displease their patron and favored customer. As reported by one of the Government's accounting witnesses, C. B. Townsend, ". . . it is understood that such right [the right to indemnity] has, in the past, not ordinarily been exercised by the Government in cases in which the contractor gave **adequate cooperation**[1] in the defense." [Townsend's June 1948 Memorandum, Resp. App.[2] E, p. 27a]

Third. The speculations of Bell and Eltra as to the supposed effects on Petitioner of the decision below do not assist the Court in its assessment of the Petition.

Fourth. Bell is a behind-the-scenes party, having had ample opportunity to contribute to the Government's Petition. See Bell's own statements in its proffered brief (beginning last sentence page 3—page 4) as to its "consultation" and participation with the Government in the proceedings before the Court of Claims.

Fifth. George Galerstein, Esq., Bell's Chief Legal Counsel, who sought Respondent's consent to the filing of an *amicus* brief for Bell, and who authored and filed the

1. In all quotations, **such emphasis** has been added.

2. Throughout, Resp. App. refers to an Appendix of Respondent's main brief filed December 29, 1977, and Pet. App. refers to an Appendix of the Petition.

subject motion and the now proffered brief, **testified extensively**[3] **on behalf of the Government** at the trial on the issues of patent infringement and validity in this case. He also procured and designed the testimony of one of the Government's witnesses[4] on royalties. Such direct participation by Mr. Galerstein in the proceedings below disqualifies him from serving the Court as an *amicus*.

II. It Is Evident From Their Submissions to the Court That Bell and Eltra Do Not Meet the Standard of Candor—Higher Than That of an Advocate—Required of *Amici*

1. Bell and Eltra, parroting Petitioner, assert that the Court of Claims by its decision herein has opened the door for patent owners to raid the Treasury. Eltra's argument culminates in what it calls a "scenario", dramatizing the proposition that the Court of Claims, using its decision in this case as precedent, will hereafter award patent owners damages based on exorbitant rates. That "scenario" is of a comedy of errors, based on the contrivances of mistaken identity and deliberate misdirection of the attention of the audience.

The submissions of both Eltra and Bell lead the Court's attention away from the fact that the Court of Claims was confronted in this case with a most unusual situation, and that it clearly and consciously dealt with that situation in a way which makes impossible the imagined results which Eltra predicts and reiterates in various guises starting on page 13 and throughout the rest of its proffered brief, and which Bell also embraces on pages 8-9 of its proffered brief.

3. Liability trial transcript, Vols. 60, 61, 87, 88, and 110 through 122.

4. Testimony of Froesch on Feb. 20, 1974, accounting trial transcript, pp. 6396-97, 6400-01, 6408-10 and 6416.

In this case, the Court of Claims was confronted with the situation (1) in which its specially designated Trial Judge, Donald E. Lane had recommended the award to Respondent—for the infringement of eleven patents—of royalty compensation amounting to about 3.85% of the contract cost for the infringing procurement, (2) in which Respondent supported those recommendations, on the basis of plaintiff's 16-year licensing history *prior and up to the commencement* of the Government's appropriation of plaintiff's patented property after World War II, and (3) in which the Government, while advocating a royalty of .13%, hedged its bets by inviting the Court of Claims—if it gagged on the .13%—to split the difference by using the 2% rate of the 1947 United license, **which the Government had introduced in evidence.** [See Respondent's main brief, pp. 18 & 21]

The Court of Claims, dissatisfied with both the 3.85% and the .13% rates, accepted the Government's invitation, and explained its decision in terms of reducing the royalties recommended by the Trial Judge, and in terms of rejecting Respondent's position that valuation of Respondent's appropriated property, as of any date after the commencement of the Government's taking of that property, was constitutionally impermissible.

It is thus quite understandable that the 1947 United license at 2% and Respondent's 1947 and 1948 offers of licenses at 2% were held to ". . . have a *prima facie* title to acceptance as **the reasonable royalty** . . ." [Opinion, Pet. App. B, p. 51a]; that is, that **Respondent** could not be heard to complain if the Trial Judge's recommended award was "meat axed" [Pet. App. B., p. 77a] to the level at which Respondent had offered post-war licenses generally.

Bell and Eltra argue that this language will induce future "claimants" to offer licenses contrivedly, at unrealistically high rates, and then bring proofs of such offers

before the Court of Claims, and that on the precedent of this case the court will enthusiastically base awards on such offers.

In making that argument, **both Bell and Eltra have failed to advise the Court** that the Court of Claims' opinion, in clear language, has precluded the very result Bell and Eltra have conjured up. Thus, they have failed to advise the Court that the Court of Claims' opinion announces not only that it **will not countenance** "attempts by the condemnee to seek a *higher* award on the basis of offers **made by or to him**" [Pet. App. B, p. 50a], but that it will use such offers, **at the behest of the condemnor,** to arrive at *lower* awards:

> "It is obvious that, although the inherent defects of offers made *by* condemnee owners prevent the opposite party, the condemnor, from being bound by such offers, **there is no reason why the owner himself should not be held to his own offer.**" [Ibid]

In that one sentence the Court of Claims gave notice that it would not allow the Treasury to be raided as Bell and Eltra direly predict, and, at the same time, explained its consideration and use of the unaccepted license offers —which were also adduced by the Government—*to cut down* a recommended award which the court considered too high.

The clarity with which the Court of Claims has thus expressed itself precludes any candid pursuit of review in this Court as sought by Petitioner and as seconded by Bell and Eltra. It was only by the stultifying tactic of **pretending** that it was Respondent, not Petitioner, who introduced, vouched for, and urged upon the Court of Claims the 2% evidence, that Petitioner and its friends could so attack the decision below. Actually, as demonstrated by the Court

of Claims' opinion, it reviewed and considered a mass of evidence on royalties and at *Petitioner's* urging, relied on Petitioner's 2% evidence to slice the award to the 2% level. [Respondent's main brief, pp. 20-27]

It is disappointing that Petitioner failed to inform the Court of crucial facts—Petitioner's introduction of and reliance on the 2% evidence. It is more than disappointing that the prospective *amici* likewise have failed to so inform the Court.

II-2. Petitioner's ultimate objective is to have the Court declare that Glassman's .13% royalty rate is *the* proper measure of compensation in this case. Respondent has pointed out in its main brief (pp. 27-30) that the evidence on which Petitioner relies is both irrelevant and incompetent. Bell and Eltra seek to prop up the .13% rate by falsely representing, or at least implying, that Glassman's testimony comprehended the essential element of reasonableness. They both do this through the device of the same unattributed quotation:

> "The Government's expert witness testified as to 'reasonable and entire compensation' due respondent." [Bell's brief, p. 6, 3rd para.]
>
> ". . . The Government's able and experienced expert witness testified as to how 'reasonable and entire compensation' should be computed." [Eltra's brief, p. 11, first full para.]

The "expert witness", Lawrence Glassman, **never testified** that his proposed royalties would provide Respondent "reasonable and entire compensation"; he did testify that **'reasonableness' of royalties was not a factor which he considered.** [Trial Judge's Opinion, Pet. App. B., p. 17a]

II-3. The Chief Justice's Order of October 6, 1977, put all concerned on notice that the Petition is subject to a

grave [5] jurisdictional question. The Petition, however, contains only a perfunctory and incomplete jurisdictional statement, as pointed out in Respondent's main brief (pp. 3-7). Perhaps it is Petitioner's plan to address this question in a reply brief to be filed at the eleventh hour, and thus preclude Respondent from filing a timely response. But, for potential *amici* slavishly to copy [5] both Petitioner's Jurisdictional statement and Petitioner's stonewalling tactics on the question of jurisdiction, demonstrates that their objective is not to assist the Court, but simply to give the Petitioner two more voices.

II-4. Eltra's position as to its *interest* in this litigation is equivocal, to say the least. Eltra does not even aver that it is indemnitor to the Government, but merely says:

(1) it "will be **required by the Government** to indemnify it . . ." [Eltra's motion, p. 2],

(2) **"The Government contends** that in at least some of the contracts for . . . these [Hiller] helicopters . . . , Hiller agreed to indemnify the Government . . ." [Eltra's brief, p. 7], and

(3) "Eltra **might** be liable . . ." to indemnify the Government. [Ibid] (All **emphasis** added)

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5. Under "Jurisdiction" both of the proffered briefs reiterate and confirm the Government's admission in its Petition that "the questions presented here" were announced by the Court of Claims' opinion of December 15, 1976. As pointed out at pages 8-9 of Respondent's main brief, the statutorily limited period for filing the Petition expired on August 1, 1977, but it was not filed until November 9, 1977. And, in its application for the maximum 60-day extension for filing a petition, i.e., to August 1, 1977, the Government admitted that, "The time for filing a petition for a writ of certiorari, unless extended, **will expire on June 2, 1977**", which date was 90 days after the Court of Claims' order of March 4 on the motions of both parties for rehearing on the opinion and judgment of December 15, 1976.

Being justifiably in doubt that its uncertain status as an indemnitor would support its position as an *amicus,* Eltra falsely informs the Court:

> "Eltra has agreed to pay Respondent the same rate of compensation for certain commercial helicopters as is finally determined by the Court of Claims in this case." [Eltra's brief, p. 7]

Such an agreement was initially effected between Eltra and Respondent in November, 1963, but in May, 1967 Eltra negotiated a paid-up settlement with Respondent, on the same basis on which Bell had previously settled with Respondent, for its commercial non-Government helicopters.

II-5. In its argument as to the supposed conflict between the Court of Claims' decision in the present case and in *Tektronix v. United States,* Eltra's brief at page 16 argues that the Court of Claims should have used "its own *precedent* in the *Tektronix* case" in determining the royalty compensation to be awarded in the present case. The *Tektronix* decision *followed* and *did not precede* the Court of Claims decision in the present case!

II-6. Eltra correctly says at page 12 of its brief that the Court of Claims viewed certain of Respondent's negotiations with United in 1948 "as compromises of possible litigation", and then Eltra incorrectly asserts that this view, "has no basis in the record, and can only be considered the result of speculation." Respondent's main brief (pages 24-26) discusses the evidence which was before the court regarding the 1948 negotiations with United; viz., the Townsend Memorandum [Resp. App. E, pp. 21a-38a], the United-to-Autogiro letter of July 1948 [footnote 11 to the opinion below, Pet. App. B., pp. 48a-49a], and the Government's August 1948 defiance of Autogiro [Finding 471, Resp. App. B, p. 14a].

Eltra is obviously unfamiliar with the evidence and imperfectly informed as to the Court of Claims' opinion. How can the Court be assisted by such recklessness?

II-7. An equally glaring example of the recklessness of both Bell and Eltra is their identical charge that the Court of Claims "ignored" the 1947-1948 $500 per aircraft royalty provision of the 1947 United license [Bell brief, p. 7 and Eltra brief, p. 12] Far from ignoring that $500 royalty provision, in both its opinion [Footnote 16, Pet. App. B, p. 53a] and in its supplemental order of June 21, 1977 [Resp. App. A, p. 2a, para. 1], the Court of Claims prescribed, in accord with that provision, that Respondent should receive $500 per aircraft for the Government's infringing procurement prior to January 1, 1949.

III. The Motions, Even as Augmented by the Proffered Briefs, Do Not Present the Showing Required by Rule 42, Paragraph 3

1. Eltra does not state the nature of its interest concisely, but rather diffusely and falsely. [See Section II-4, *supra*]

2. Neither Bell nor Eltra sets forth any fact not presented by the parties—merely speculation as to the supposed effects of the decision below.

3. Both Bell and Eltra set forth "Questions Presented" which differ from those presented by Petitioner, but neither discusses the differences or ". . . their relevancy to the disposition of the case."

Conclusion

The motions of Bell and Eltra should be denied, and the proffered *amici* briefs should be rejected.

Respectfully submitted,

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